Filed 6/13/17 P. v. Hollowell CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TROY JASON HOLLOWELL, Defendant and Appellant.	C080896 (Super. Ct. No. 11F06405)

Defendant Troy Jason Hollowell appeals from the trial court's denial of his Penal Code section 1170.18[1] petition for resentencing. He contends the court erred in failing to strike one of his prior prison terms after the underlying conviction for that term was redesignated a misdemeanor in a separate 1170.18 proceeding. We conclude section 1170.18 does not apply retroactively to invalidate the prison prior when the conviction

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1 Undesignated statutory references are to the Penal Code.

that supported the prison prior is later reduced to a misdemeanor. We affirm the trial court's order.

BACKGROUND[2]

In July 2012, defendant pleaded no contest to possessing a forged check (§ 475, subd. (c)) and identity theft with a prior identity theft conviction (§ 530.5, subd. (c)(2)), and admitted a strike and five prior prison terms (§§ 1170.12, 667.5, subd. (b)). One of the prison priors was based on a 2003 Sacramento County conviction for petty theft with a prior (§ 666). Defendant was sentenced to serve a stipulated nine-year state prison term.

In March 2015, defendant successfully petitioned to designate the petty theft with a prior conviction as a misdemeanor pursuant to section 1170.18.

Defendant subsequently filed a section 1170.18 petition to reduce the identity theft conviction to a misdemeanor that the trial court denied.

DISCUSSION

Defendant contends the trial court should have stricken the prison prior because once the underlying petty theft with a prior conviction was reduced to a misdemeanor, the imposed sentence was unauthorized.[3] Defendant argues the retroactive application of a change in the law reducing a crime to a misdemeanor to bar imposition of an enhancement is consistent with the retroactivity rule *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and the decision in *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*). He

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[2] We dispense with a recitation of the facts of defendant's crimes as it is unnecessary to resolve this appeal.

[3] Defendant, who was not represented by counsel in the trial court, did not petition to strike the prison prior. Since he contends on appeal the prison prior is unauthorized, we address the merits of his contention.

additionally argues retroactive application is consistent with the text of section 1170.18, subdivision (k) (Subdivision (k)).

The passage of Proposition 47 (as approved by voters Gen. Elec., Nov. 4, 2014, eff. Nov. 5, 2014), the Safe Neighborhoods and Schools Act (the Act), created section 1170.18 that provides in pertinent part: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (Subd. (k).) Since the prior prison term enhancement requires a defendant to be convicted of a felony and to have served a prison term for that conviction (§ 667.5, subd. (b)), this raises the question of whether a prior prison term enhancement based on what would now qualify as a misdemeanor conviction survives the Act.[4] "In interpreting a voter initiative, we apply the same principles that govern our construction of a statute. [Citation.] We turn first to the statutory language,

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[4] This issue is currently before the California Supreme Court. (See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011.)

giving the words their ordinary meaning. [Citation.] If the statutory language is not ambiguous, then the plain meaning of the language governs. [Citation.] If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved. [Citations.]" (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

Subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). *Rivera* held subdivision (k), which parallels the language from section 17 regarding the reduction of wobblers to misdemeanors,[5] should be interpreted in the same way as being prospective, from that point on, and not for retroactive purposes. (*Rivera*, at p. 1100; see also *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) The court in *Rivera* accordingly concluded the felony status of an offense charged as a felony did not change after the Act was passed, thereby conferring jurisdiction on the Court of Appeal.[6] (*Rivera*, at pp. 1094-1095, 1099-

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[5] Section 17, subdivision (b), states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

[6] *Rivera* also noted the absence of any evidence the voters wanted to go beyond directly reducing future and past punishment for convictions under the six included offenses. (*Rivera, supra*, 233 Cal.App.4th at p. 1100 ["Nothing in the text of Proposition 47 or the ballot materials for Proposition 47--including the uncodified portions of the measure, the official title and summary, the analysis by the legislative analyst, or the

1101.) We see no reason to depart from *Rivera*. Although *Rivera* addressed subdivision (k) in a different context, its analysis of subdivision (k) is equally applicable here.

Our interpretation of subdivision (k) is consistent with the Supreme Court's treatment of an analogous provision in *People v. Park* (2013) 56 Cal.4th 782. The Supreme Court held in *Park* that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b), could not subsequently be used to support an enhancement under section 667, subdivision (a). (*Park*, at p. 798.) Applying the reduction to eliminate an enhancement would be a retroactive application that is impermissible under both section 17 and the Act. The distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*. "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667, [subdivision] (a) enhancement had he [or she] committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park*, at p. 802.) Retroactive versus prospective application was also invoked by the Supreme Court in distinguishing cases cited by the Attorney General. "None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision] (b) to reduce a wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a subsequent serious felony offense." (*Id*. at pp. 799-800.)

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arguments in favor or against Proposition 47--contains any indication that Proposition 47 or the language of . . . subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction"].)

"Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears." (*Estate of Griswold* (2001) 25 Cal.4th 904, 915-916.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source. [Citation.]" (*In re Harris* (1989) 49 Cal.3d 131, 136.)

The drafters of Proposition 47 and the voters knew section 17, which contained the "for all purposes" phrase found in subdivision (k), had been consistently interpreted by the Supreme Court so as not to give retroactive effect to provide an action reducing a wobbler from a felony to a misdemeanor. Defendant does not give any reason to depart from a similar construction of the essentially identical operative text of subdivision (k).

Neither *Flores* nor *Estrada, supra,* 63 Cal.2d 740 supports a different interpretation of the Act. The defendant in *Flores* was sentenced to prison following his conviction of selling heroin (Health & Saf. Code, § 11352), and his state prison sentence for that crime was enhanced by one year for a prior prison term. (*Flores, supra*, 92 Cal.App.3d at pp. 464, 470.) The enhancement was based on a prior felony conviction of possession of marijuana under Health and Safety Code section 11357. (*Flores*, at p. 470.) That statute had since been amended in 1975 to make possession of marijuana a misdemeanor. (*Id.* at p. 471.)

The *Flores* court noted that in 1976, the Legislature enacted Health and Safety Code section 11361.5, subdivision (b), that "authorize[d] the superior court, on petition, to order the destruction of all records of arrests and convictions for possession of marijuana, held by any court or state or local agency and occurring prior to January 1,

1976." (*Flores, supra*, 92 Cal.App.3d at p. 471.) Also in 1976, Health and Safety Code section 11361.7 "was added to provide in pertinent part that: '(a) Any record subject to destruction . . . pursuant to Section 11361.5, or more than two years of age, or a record of a conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 which became final more than two years previously, *shall not be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person* . . . . (b) No public agency shall alter, amend, assess, condition, deny, limit, postpone, qualify, revoke, surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title of any person because of an arrest or conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 . . . on or after the date the records . . . are required to be destroyed . . . or two years from the date of such conviction . . . with respect to . . . convictions occurring prior to January 1, 1976.' " (*Flores*, at pp. 471-472.) Based on these amendments, the court concluded that "the Legislature intended to prohibit the use of the specified records for the purpose of imposing any collateral sanctions," such as the prior prison term enhancement. (*Id.* at p. 472.)

Flores, supra, 92 Cal.App.3d 461 is inapposite because there is no similar declaration of legislative intent for full retroactivity either in the Act generally or section 1170.18 in particular. If the Act's drafters wanted to invalidate prior prison term allegations because the underlying felony was now a misdemeanor, they could have included legislative language like that discussed in *Flores*. They did not.

Defendant's reliance on *Estrada* fares no better. *Estrada* held that if an amended statute mitigates punishment, the amendment will operate retroactively to impose the lighter punishment unless there is a saving clause. (*Estrada, supra*, 63 Cal.2d at p. 748.) The reason for this rule was that " '[a] legislative mitigation of the penalty for a particular

crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.' " (*Id*. at p. 745.) While the electorate intended to reduce penalties for crimes when it passed the Act, it did so only for those crimes the Act specifically covers. Retroactivity is limited to the procedures set forth in section 1170.18, which in turn applies to the offenses specifically addressed by the Act. The prior prison term enhancement is not one of those provisions, and therefore is not subject to the Act's retroactive application.

We conclude section 1170.18 does not apply retroactively to invalidate a previously imposed prior prison term enhancement when the conviction that supported the enhancement is later reduced to a misdemeanor.

DISPOSITION

The judgment (order denying defendant's petition) is affirmed.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
MURRAY, J.